APPENDIX

Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79 *et seq.*:

SEC. 11. (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

* * * * *

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corpor-

ate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

(c) Any order under subsection (b) shall be complied with within one year from the date of such order; but the Commission shall, upon a showing (made before or after the entry of such order) that the applicant has been or will be unable in the exercise of due diligence to comply with such order within such time, extend such time for an additional period not exceeding one year if it finds such extension necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so pos-

sessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such

plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

* * * * *

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served

upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the

United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

* * * * *

SEC. 26. (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this title or of any rule, regulation, or order thereunder, and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, regulation, or order.

(c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the mak-

ing of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

In the United States Circuit Court of Appeals for the Seventh Circuit

No. 8106—October Term, 1942, January Session, 1943

CITY NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AS SUCCESSOR TRUSTEE, ETC., PETITIONER

vs.

SECURITIES AND EXCHANGE COMMISSION AND NORTH AMERICAN LIGHT & POWER COMPANY, RESPONDENTS

Petition for Review of Order of the Securities and Exchange Commission

March 5, 1943

Before MAJOR, KERNER, and MINTON, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is a petition to review an order of the Securities and Exchange Commission, entered July 10, 1942, under the Public Utility Holding Company Act of 1935 (hereinafter called "the Act"), 49 Stat. 803, 15 U. S. C. § 79a *et seq.* The order approved an application (called Application No. 2) filed by the respondent, North American Light and Power Company (called Light and Power), for authority to retire its outstanding publicly held debentures, for which petitioner was a successor trustee.

Light and Power, incorporated in 1924 under the laws of Delaware, is a subsidiary of the North American Company (called North American), both of which are holding companies registered under the Act. North American owns 85% of Light and Power's common stock, 43% of its preferred stock and 62.4% of its debentures.

The proceeding was instituted by the Commission on December 2, 1941 to determine, among other things, whether under Sec. 11 (b) (2) of the Act an order should be entered requiring the liquidation and dissolution of Light and Power, and the distribution of its assets to its security holders in accordance with a fair and equitable plan. On December 30, 1941, the Commission, in conformity with its findings and opinion that the continued existence of Light and Power was in violation of the Act and that liquidation and dissolution were necessary to comply therewith, entered its order that Light and Power be liquidated and its existence terminated. Light and Power was directed to proceed with due diligence to submit to the Commission a plan or plans for its prompt liquidation and the termination of its existence in a manner consistent with the provisions of the Act. (The period within which this order could be reviewed has expired. Sec. 24 (a) of the Act.)

Among the applications filed by Light and Power for approval of steps necessary to carry out the required liquidation was Application No. 2, upon which the order under review was predicated. Of the outstanding debentures, the principal amount of $3,376,500 was held by the public and $5,623,500 held by North American (the parent of Light and Power). The application proposed the retirement of the former by payment of the principal amount of such debentures with interest accrued to July 1, 1942, but without payment of any premium.[1] It was not proposed to pay off

[1] The application provided that the debenture holders accepting principal and accrued interest would not be deemed

the debentures held by North American at the same time for the stated reason that questions had been raised as to the right of North American to be paid on the same basis as the public holders. The Commission, in its order approving the application, found that immediate retirement of the publicly held debentures was practical and necessary to effect the provisions of Sec. 11 (b) (2) and to enable Light and Power to liquidate and dissolve in accordance with the order of December 30, 1941, and was fair and equitable to the persons affected thereby. Interest was allowed upon the debentures until August 21, 1942 and thereafter the debenture holders were paid amounts equal to the principal plus interest accrued to that date.

The primary question for decision is whether the order authorizing the retirement by Light and Power of its publicly held debentures, without the payment of premium, is valid and lawful. It is the contention of the Commission that payment of a premium was required only in the event of their voluntary retirement, that such requirement is not applicable to the instant situation because the retirement was involuntary—necessitated by the Commission's order requiring liquidation and dissolution of the corporation. In this connection, it is also contended that the purpose of the debenture agreement was frustrated and rendered impossible of attainment by the supervening mandate of the Act and the Commission's order thereunder. On the other hand, petitioner contends that the debenture holders had a contractual right

to have waived the redemption premium if it should be determined upon review of the Commission's order that they were entitled to such premium.

to the redemption premium, of which they could not be legally deprived. In this connection, it is argued that the retirement of the debentures was the voluntary act of Light and Power, but that even if involuntary, they could not be deprived of the benefit of the redemption provision. To do so, it is urged, is violative of Sec. 26 (c)[2] of the Act, and the Fifth Amendment of the United States Constitution.

In the beginning, we think it may be assumed that an order of the Commission which impaired or destroyed a property right fixed by contract would violate Sec. 26 (c) of the Act. Furthermore, such an order would not be "fair and equitable to the persons affected by such plan," as required by Sec. 11 (e) of the Act. *Case* v. *Los Angeles Lumber Co.,* 308 U. S. 106, 114; *Consolidated Rock Co.* v. *DuBois,* 312 U. S. 510. Petitioner's contention in this respect, however, carries little, if any, force, because he must, as we view the matter, stand or fall on the issue as to whether Light and Power was obligated by contract to pay a premium on redemption under the circumstances with which it was confronted.

We shall first consider petitioner's contention that the Commission erroneously determined that the dissolution was the result of a "compulsory liquidation by Congressional mandate." In support thereof, certain acts and events which trans-

[2] This section provides that "nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit * * * made or of any lien created prior or subsequent to the enactment of this title unless at the time of the making of such loan or extension of credit * * * (Circumstances enumerated not here material)."

pired prior to the Commission's liquidation order of December 30, 1941, are relied upon. Briefly, the record discloses that during a hearing in a proceeding instituted by the Commission against North American (parent company), it developed that a continuation of the then existing status of Light and Power was doubtful. On May 9, 1941, the directors of Light and Power adopted a resolution, proposing to the stockholders that the corporation be dissolved. It is admitted that this action was influenced by the prospective application of the Act, but it is urged that other factors were determinative. The president of Light and Power by affidavit stated, in effect, that the directors decided there was no economic justification for the continued existence of the company and that it would have been liquidated, irrespective of the Act.

It was decided to dissolve under the Delaware Corporation Law and to liquidate under the direction of a Chancery Court of that state. The stockholders of Light and Power were so notified. It is disclosed that the Commission opposed the proposed liquidation action in the state court, and on June 3, 1941, entered an order prohibiting North American from voting its stock at the proposed dissolution meeting and prohibiting Light and Power from holding the stockholders' meeting. On the following day, the Commission instituted proceedings in the United States District Court of Delaware, seeking to enjoin Light and Power and North American from violating the provisions of its order. It is claimed that dissolution in the state court, except for interference by the Commission, would have been certain inas-

much as North American, which owned sufficient shares to insure passage of the dissolution resolution, had agreed to vote its shares in favor thereof. Further action was held in abeyance until December 2, 1941, when the Commission ordered that a hearing be held on December 22, 1941 for the purpose of considering whether an order should be entered requiring liquidation by Light and Power. Counsel at this hearing stated that the appearance of Light and Power was without prejudice to the dissolution proceeding pending in the Delaware Court. It was at the termination of this hearing that the Commission on December 30, 1941 entered its liquidation order which resulted in the filing on April 30, 1942 by Light and Power of its Application No. 2, seeking authority from the Commission for its proposed plan of liquidation.

Reference to legal textbooks, digests, etc. is convincing that it is difficult to define with exactitude the word "voluntarily." We think it can be safely said that whether an act is voluntarily performed depends not merely on the act of performance but upon the attending circumstances and conditions. Petitioner suggests as analogous to the asserted voluntary action of Light and Power the action of a person subject to the draft who enlists in the military service. Assuming the pertinency of this analogy, we doubt if it is of any benefit to petitioner. It does illustrate, however, that the character of the act depends upon the circumstances under which it is performed. For instance, a person subject to draft who because of age, deferred classification, or other

reason has only a remote possibility of being called for service, who nevertheless enlists, could well contend that such enlistment was voluntary action on his part. On the other hand, what can be said of a person subject to draft who enlists at a time when he knows that he is to be called immediately or at an early date? Of course, he would be known as a volunteer, as that term is commonly understood, but would such enlistment be voluntary action on his part? It is possible that it might be, but the circumstances would strongly militate against such a conclusion. If his draft status as determined by law was the thing which caused, induced or prompted the enlistment or substantially contributed thereto, then we think it could not be said that his action was voluntary.

So in the instant case, the mere naked acts of the officials of Light and Power with reference to dissolution affords some basis for the assertion that it was a voluntary dissolution. Such acts, however, when considered in connection with the circumstances, are well near stripped of all potency. For some eight years the corporation had existed in a dormant condition, with business activities of such a meager nature as to require the services of only one paid officer and one employee. It is strikingly significant, so we think, that it apparently did not occur to it that its interest lay in dissolution until after the enactment of the Act, nor even then until the Commission had instituted proceedings against North American, its parent corporation, which owned a large part of its bonds and stocks. It is more

than a reasonable—it is an inescapable—inference that its sudden impulse to dissolve was born of the knowledge as to the requirements of the law. Faced squarely with what must have been thought to be the inevitable, it was decided to take action which could have as well been taken years before. We think there is no doubt but that the Commission was justified in finding that such action was the result of legal compulsion rather than the voluntary act of the corporation.[3] Such finding is not impaired by the fact that the corporation was agreeable to and acquiesced in that from which there was no escape. Neither is it important that the dissolution proceeding in the state court was stayed by the hand of the Commission. It is unquestioned that the Commission was the designated authority and charged with responsibility of fixing the terms and conditions of dissolution. Furthermore, the acts of the parties in the state court, as well as those prior thereto, are of little consequence because the order now under review was the direct result of the Commission's dissolution mandate contained in its order of December 30, 1941, from which no review was sought and which now must be treated as the operative cause of the liquidation proceeding.

Incidental to and in support of its contention that the dissolution was voluntary, petitioner advances a theory that at the time the order under review was entered there was no prospect of im-

[3] Sec. 79 (x) (U. S. C. A.) provides: "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

mediate liquidation and no assurance that the same could be completed within any certain time. From this premise, it is argued that action by the corporation toward dissolution at the particular time was its free act, even though it might at some time in the future have been compelled to dissolve. In other words, it is asserted that the Commission's order of December 30, 1941 merely required a certain result and that the manner of arriving at the result remained in the control of the corporation. We suppose in the narrow aspect of the situation that this is true, but viewing the matter as a whole, we think the contention is without merit. After all, Application No. 2 was filed in compliance with the Commission's mandate, and we think it relatively unimportant that as one step in the dissolution the Application contained the request for authority to retire one class of debentures on a certain date rather than some other date a few months later.

Thus we come to the principal question presented, that is, whether the debentureholders had a contract right to the payment of a premium upon redemption of the debentures occasioned by the involuntary act of Light and Power. In other words, did the order of the Commission which required the payment of the debenture principal plus accrued interest without payment of premium violate a contract obligation?

The debentures were issued under an Agreement dated July 1, 1926. They bear interest at the rate of 5½% per annum and mature by their terms on July 1, 1956. Sec. 2 of the Agreement provides: "The debentures * * * shall be

redeemable at the option of the company * * * at the principal amounts, together with premiums as follows * * * one and one-half percent (1½) of the principal amount of debentures redeemed after July 1, 1941, and on or before July 1, 1946 * * *." Sec. 23 provides: "Such of the debentures * * * as are, by their terms, redeemable before maturity may, at the option of the company, be redeemed at such times, etc."

There can be little, if any, doubt, so we think, but that the provisions concerning redemption had to do solely with voluntary action on the part of the corporation. The debentureholder was without right to require redemption. That was a right accorded to the corporation, to be exercised solely "at the option of the company." It is only upon the exercise of such option that the agreement requires the payment of a premium. Such option lodges in the corporation the discretion to mature the debentures at a date earlier than that otherwise provided. While it is true that the payment of premium was a form of compensation to the debentureholders, nevertheless the redemption provision was for the benefit of the corporation, which could be utilized only at its election. The language plainly indicates that the parties did not contemplate that the redemption provision should be effective upon action by the corporation as a result of the Commission's order. Action under legal compulsion is the antithesis of action by election or "at the option" of the moving party.

Numerous authorities are cited and discussed relating to the doctrine of impossibility of contract performance and the closely allied doctrine of frustration of purpose. In the recent case of *New York Trust Co. et al.* v. *Securities and Exchange Commission,* 131 Fed. (2d) 274, the court rejected the contention that the contractual provisions for redemption premium were applicable. The questions presented and decided in that case are almost identical with those of the instant case, and the cases relied upon here were in the main considered. Inasmuch as we agree with both the reasoning and the result in that case, we think no good purpose could be served by a discussion of such cases.

Petitioner's effort to distinguish the New York Trust Co. case rests largely on the contention that the court there had before it a situation wherein the liquidation was involuntary, while here the proceeding was the result of voluntary action. As already shown, the action in the instant case was involuntary; hence this asserted distinction fails. In this connection, we refer to another provision of the debenture agreement which petitioner asserts shows the intention of the parties that the redemption provision was to be given effect upon dissolution, irrespective of the occasion therefor. It is Sec. 50 of Article X, entitled "Successors and Assigns." It provides: "Subject to the proviso hereinafter in this section set forth, it is agreed that if the company shall convey and transfer all or substantially all of its property * * * in connection with or as a result of which the company shall be dis-

solved and its affairs shall be wound up or liquidated upon terms providing that cash shall be distributed among stockholders of the company * * * the principal of all debentures issued hereunder and then outstanding shall become immediately due and payable, at their redemption price * * *." We are of the view that there is nothing in the language of this section inconsistent with the interpretation which we have placed upon Sec. 2. It appears that this section was to meet a situation wherein the corporation was being dissolved or liquidated by conveyance or transfer of "all or substantially all of its property as a whole or in parcels" to an assignee or successor concern, rather than by a dissolution as a result of legal compulsion. In any event, there is nothing in the language to indicate that the parties intended that it should be applicable to an involuntary dissolution; in fact, the language indicates to the contrary, and is, therefore, consistent with the language of Sec. 2.

Lastly, petitioner argues that the authorization for the retirement of the publicly held debentures was not "fair and equitable," as required by Sec. 11 (e) of the Act. In this connection, it is asserted that after the retirement of the publicly held debentures, in the principal amount of $3,376,500, there remained as outstanding $5,623,500 of debentures, with a continuing obligation to pay interest at 5½%. It is claimed that because of a provision in the debenture relative to partial redemption the debentures redeemed should have been determined by

lot. Such provision, no doubt, would have been controlling in case of a voluntary dissolution, but we think it is without effect in the instant situation. Neither do we think that the action of the Commission discriminated against the publicly owned debentures merely from the fact that it did not order the redemption of all debentures at the same time or that some time may elapse before the debentures held by North American are redeemed. We are bound to take note of the fact that in a proceeding such as the instant one, many difficult and complicated questions are calculated to arise, which must be determined before liquidation can be finally completed. Without going into detail, the record discloses that numerous legal questions must be determined, arising as a result of the relation existing between Light and Power and North American, its parent corporation. Until such questions are solved, it is not possible to know the exact status of North American as a holder of debentures, including the basis on which it is entitled to receive payment. We cannot assume that the Commission in its future actions will accord to the debentures held by North American a more favorable status than it has accorded the debentures in suit. In fact, we think we must assume to the contrary.

Light and Power, at the time of the entry of the order under attack, had approximately $4,000,000 of cash available for the calling of its debentures, of which it had some $9,000,000 outstanding. Thus, it had cash in an amount slightly more than sufficient to pay the publicly held de-

bentures. The Commission was confronted with the proposition of authorizing their payment or permitting this cash to lie idle. As we view the situation, the Commission's action was neither unreasonable nor arbitrary. Moreover, the contractual rights of the debentureholders having been recognized and satisfied, they have no cause to complain.

The order of the Commission is affirmed.

A true Copy:

Teste:

_____ _____,

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1943